In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 47

ST. REGIS PAPER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO RECALL AND AMEND OR CORRECT THE JUDGMENT OF THIS COURT

This motion seeks to shorten the period for which petitioner is subject to civil penalties for its failure to comply with orders of the Federal Trade Commission directing it to submit certain special reports. In its decision of December 11, 1961, this Court held that the statutory penalty of $100 a day "began to run 30 days after the notice of default on the first set of the Commission's orders [which notice was served on June 20, 1959, slip op., p. 5, R. 87] * * * and * * * runs until the date of our stay, February 7, 1961" (slip op., p. 14). Petitioner, relying on certain stay orders of the district court and the court of appeals, seeks to amend or correct the judgment of this Court to limit penalties to the period between July 20, 1959, and June 20, 1960, the date of the first of those orders (Motion, p. 4).

This motion should be denied because (1) it is a consecutive and untimely petition for rehearing which is prohibited by Rule 58(4) of the Revised Rules; and (2) it has no merit.

1. Although the motion in form is one to recall and amend or correct the judgment, in fact it is a petition for rehearing. It asks this Court to reverse its holding that the daily penalties ran until February 7, 1961, and instead to hold that the penalties ceased to accrue on June 20, 1960. Petitioner, however, has already filed a petition for rehearing of this Court's decision, which the Court denied on January 15, 1962. The present motion is an untimely attempt to seek rehearing on another issue that could have been, but was not, challenged in the first petition for rehearing.[1]

2. There is no substance to petitioner's argument that the lower court orders on which it relies stayed the imposition of penalties after June 20, 1960. Examination of those orders shows that this Court correctly held that petitioner is liable for penalties to February 7, 1961.

The Commission served its notice of default on the first set of orders on June 20, 1959, and under the statute the penalties began to accrue 30 days thereafter, on July 20, 1959. The government's suit in the district court sought two things: (1) a mandatory

[1] Although the petition for rehearing raised no issue as to the period during which penalties accrued, petitioner, in its reply brief on the merits, made substantially the same argument that it now makes. It there contended (footnote, p. 17) that no penalties should be assessed for any period after April 21, 1960, the date on which the district court entered its final judgment, because of the stay orders entered by the courts below.

injunction to compel compliance with the Commission's orders, and (2) the statutory penalty of $100 a day "for every day petitioner was in default of those orders directed specifically to it" (slip op., p. 2). The district court granted a mandatory injunction as to those portions of the Commission orders which it held were valid and as to which petitioner was still in default, but refused to award penalties (R. 204–212). Its judgment (R. 213–216), entered on April 21, 1960, directed petitioner to answer designated questions in the Commission's orders (some within 30, and the remainder within 60, days), and dismissed the count of the complaint seeking penalties.

The government appealed from the dismissal of its claim for penalties, and petitioner cross-appealed from the order insofar as it directed compliance. On June 20, 1960, the district court entered an order (Motion, p. 6) staying for 20 days the enforcement of its judgment of April 21, 1960, to enable petitioner to apply to the court of appeals "for an order suspending the enforcement of the said judgment pending the hearing and determination" of petitioner's appeal. On July 8, 1960, the court of appeals, on petitioner's motion, granted a "stay pending appeal" (Motion, p. 7). In an accompanying opinion (Appendix, *infra*, pp. 8–9), Judge Friendly stated that the district court had granted "a stay of enforcement of the 60-day provisions for 20 days," and that he was granting "a stay of the 60-day provisions of the judgment pending appeal." The "60-day provisions" of the judgment were those requiring petitioner to answer certain questions within 60 days. (Judge Friendly

noted that petitioner had already complied with the provisions directing the answering of other questions within 30 days.)

These two orders—upon which petitioner relies for its claim that penalties ceased to accrue after June 20, 1960—had nothing to do with the accrual of penalties. They did not stay the Commission's orders directing petitioner to submit the special reports. They merely stayed those portions of the district court's judgment that directed petitioner to answer certain questions within 60 days. Their purpose was to prevent the case from becoming moot during the appeal (which would have occurred had petitioner complied), and to protect petitioner from being held in contempt as the price for testing the orders on appeal, if its appeal failed.

The statutory penalty of $100 a day is imposed for failure "to file any * * * special report * * * within the time fixed by the commission for filing the same * * *" (15 U.S.C. 50), and not for violation of the court's enforcement order. The purpose of the penalty is to "furnish sufficient inducement to compliance with requests for information" (*United States* v. *Clyde S.S. Co.*, 36 F. 2d 691, 694 (C.A. 2) and, as the court of appeals pointed out, when one refuses to do what the law requires, he acts at his peril, in the sense that he must be held to the acceptance of any "lawful consequences attached to the refusal" (R. 230, quoting *Life & Cas. Ins. Co.* v. *McCray*, 291 U.S. 566, 574). Until the Commission's orders directing the filing of such reports were stayed, or until the running of penalties was expressly tolled,

the daily penalties continued to accrue. As shown below, the Commission's orders were never stayed, and the accrual of penalties was not stayed until this Court's order of March 27, 1961.

It was not until after the court of appeals held on December 16, 1960, that petitioner was subject to penalties (R. 218–233), that petitioner for the first time in the litigation sought, but was denied, a postponement of the effective date of the Commission's orders. On December 27, 1960, it sought both such a stay and a stay of the court of appeals' mandate pending the filing of a petition for certiorari.[2] The court granted only the latter request (R. 235–236). Chief Judge Lumbard, concurring in such action, stated (R. 235): "I would also provide that the accumulation of penalties under § 10 of the Federal Trade Commission Act be stayed for such period and to the extent that the mandate of this court is stayed."[3]

In its petition for certiorari, filed on February 7, 1961, petitioner explicitly recognized that the court of appeals had refused to stay the Commission's orders. It stated (Pet. 8–9) that it had moved in the court of appeals for both a stay of the court's mandate and "for postponement of the effective date of the Commission's orders * * *"; that the court

[2] Copies of the various papers filed in the court of appeals in connection with the stay have been lodged with the Clerk.

[3] This Court held that the court of appeals had not abused its discretion in refusing to stay the effective date of the Commission's order. It noted that petitioner had not sought such a stay in the district court. Slip op., p. 17, note 13.

had "ordered its mandate stayed, as requested, but failed to grant petitioner's further application for postponement of the effective date of the Commission's orders"; and that, concurrently with the filing of the petition, it was also filing a separate motion "for an order postponing the effective date of the Commission's orders pending the conclusion of the review in this Court * * *."

This Court's order of March 27, 1961, granting the petition, further provided (R. 238) that petitioner's motion for a stay "is granted to the extent of tolling, as of the filing of its petition on February 7, 1961, and pending this Court's disposition of the writ of certiorari, the further running and accumulation of forfeitures under § 10 of the Federal Trade Commission Act * * *. Petitioner's liability for forfeitures accruing prior to February 7, 1961, is to abide the event of this litigation."[4]

This order marked the first time in this litigation that the accrual of penalties was stopped. Prior to the decision of the court of appeals awarding penal-

[4] Following the issuance of this Court's judgment to the district court after the denial of rehearing on January 15, 1962, the government moved in the district court for an award of penalties for the periods (1) July 20, 1959, to February 7, 1961, and (2) January 15, 1962, until petitioner had complied with the Commission's orders. On January 23, 1962, petitioner delivered a package of documents to the United States Attorney for the Southern District of New York, containing copies of various census reports. The other material called for by the Commission's orders was submitted after this Court, by its limited grant of certiorari (R. 237), refused to review the holding of the court of appeals that petitioner was required to submit such material.

ties, their accrual could have been terminated only by a stay of the Commission's orders directing the submission of the reports. The district court order of June 20, 1960, and the court of appeals order of July 8, 1960, however, did not stay the Commission's orders, but only the district court's compliance order of April 21, 1960. The staying of the latter order, however, did not stop the accrual of penalties. After the court of appeals' decision, that court was requested, but refused (over Judge Lumbard's dissent), to stay the accrual of penalties. This Court correctly held that petitioner is liable for penalties for the entire period from July 20, 1959, to February 7, 1961.

The motion should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

FEBRUARY 1962.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT-APPELLEE

v.

ST. REGIS PAPER COMPANY, DEFENDANT-APPELLEE-APPELLANT

Motion of cross-appellant St. Regis Paper Company for a stay of portions of judgment

FRIENDLY, *Circuit Judge:*

In an action brought by the United States against St. Regis Paper Company under 15 U.S.C. §§ 49 and 50, Chief Judge Ryan, on April 21, 1960, directed St. Regis to comply with certain portions of various orders issued by the Federal Trade Commission, allegedly pursuant to 15 U.S.C. § 46(b), within 30 days and with other portions within 60 days; he dismissed the government's claim for penalties under 15 U.S.C. § 50. On the sixtieth day following the entry of judgment, the United States appealed to this Court from the judgment or dismissal; thereupon St. Regis cross-appealed from the judgment against it, Fed. R. Civ. Proc. 73(a). St. Regis, having already complied with the 30-day provisions of the judgment, obtained from Judge Ryan on the same day a stay of enforcement of the 60-day provisions for 20 days in order to permit it to apply to this Court for a further stay. This it now does.

The principal grounds of appeal urged by St. Regis are (1) that 15 U.S.C. § 46(b) does not cover the "special reports" here required even after the excisions made by Judge Ryan, and (2) that a large part of the 60-day items are copies of reports made to the Census Bureau. As to the first ground St. Regis has an uphill battle in view of *United States* v. *Morton Salt Co.*, 338 U.S. 632, 649 (1950); still I cannot say this ground of appeal is insubstantial without examining the particular items demanded. On the second issue, the Seventh Circuit has recently reached a conclusion opposed to Judge Ryan's, *Federal Trade Commission* v. *Dilger*, 276 F. 2d 739; this ground of appeal must clearly be regarded as substantial. Failure to grant a stay would deprive the appeal of much of its value and might even render it moot; on the other hand, the government presents no specific proof that significant injury will result from a stay. St. Regis' motion for a stay of the 60-day provisions of the judgment pending appeal is therefore granted, on condition that St. Regis serve its brief and appendix as cross-appellant by August 26, and that the appeals be brought on for argument during the week of September 26. The government is also directed to serve its brief as appellant by August 26.

The parties are requested to consider whether, under § 2 of the Act of February 11, 1903, c. 544, 32 Stat. 823, as amended by § 17 of the Act of June 25, 1948, c. 646, 62 Stat. 989, the appeals have been properly taken to this Court, and to discuss this in their briefs. See *United States* v. *New York, New Haven & Hartford R. Co.*, 276 F. 2d 525, 537–543 (2d Cir. 1960).*

*The order accompanying this opinion is printed at p. 7 of petitioner's motion.

U.S. GOVERNMENT PRINTING OFFICE: 1962